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Chairman: Mr. Tulbure ..... (Moldova)

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The meeting was called to order at 10.05 a.m.

Agenda item 82: Report of the International Law Commission on the work of its fifty-ninth session (*continued*) (A/62/10)

1. **Mr. You** Ki-jun (Republic of Korea) said, on the topic of reservations to treaties, that his delegation supported the consensus in the Commission not to deviate from the relevant provisions of the 1969 and 1986 Vienna Conventions on the Law of Treaties and the 1978 Vienna Convention on Succession of States in respect of Treaties. Although most of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission were highly technical and primarily of interest to treaty lawyers in foreign offices, the Commission had begun consideration of some of the most important substantive issues on the topic concerning the validity of reservations, with a focus on the prohibition in the Vienna Conventions on reservations incompatible with the object and purpose of the treaty. Draft guideline 3.1.5, which offered a new definition of object and purpose, draft guideline 3.1.17, which prohibited reservations worded in such a way that their scope could not be determined, and the draft guidelines on reservations to general human rights treaties and to dispute settlement and monitoring provisions went to the heart of some very controversial issues about the extent to which ratifying States might exempt themselves from treaty provisions through reservations. The debate on those proposals had revealed a wide divergence of views.

2. Reservations, for better or worse, were necessary to secure the participation of many States in treaty regimes, and it would be counterproductive to adopt overly restrictive limits on them. A balance should be sought between broad participation of States in multilateral treaties and the maintenance of unity in treaty regimes. The Special Rapporteur seemed to recognize the problem, but resolution of the issues in the Commission was likely to be difficult. In particular, his delegation was doubtful about the prospects of arriving at a general definition of "object and purpose of the treaty".

3. On the topic of shared natural resources, he said that the draft articles on the law of transboundary aquifers in their current form closely resembled the substantive provisions of a framework convention. Some of the obligations set out in the draft articles nevertheless went beyond the current obligations of States and did not constitute a codification of customary law or reasonable progressive development of that law. They did address most of the substantive and procedural obligations that would logically constitute the core of a convention. However, if the draft articles did take the form of a convention, a dispute settlement mechanism going beyond the provisions in draft article 14, paragraph 3, would be necessary. As with any instrument on the sharing of resources disputes, were possible, and it would be wise to formulate provisions similar to those in the 1997 Watercourses Convention.

4. Among the other important issues to be resolved on second reading was the relationship between the framework convention and other agreements on the management and protection of transboundary aquifers, a number of which had already been concluded. The question therefore arose as to which would take precedence in the event of conflict between them, or as to whether the framework convention would be merely residual in character. His delegation was of the view that parties to a framework convention should have the option of joining with other aquifer States in concluding agreements that might diverge in substance from the convention, taking into account their local situation, in order to manage their common aquifers as they deemed best.

5. Another issue concerned States parties to the framework convention that did not share transboundary aquifers and, on the other hand, States that shared transboundary aquifers but were not parties to the convention. The draft articles contemplated the possibility that non-aquifer States could become parties and imposed obligations on them with respect to activities that might affect aquifer States. However, the articles on cooperation, information exchange, protection of ecosystems, pollution control and management did not apply to non-aquifer States. Without any real incentives for non-aquifer States to join, it was likely that only aquifer States would become parties to such an instrument.

6. There was also the question of whether States parties should be charged with obligations to protect the aquifers of non-party States from damage caused by activities in their territories. The widespread dependence of human populations and some ecosystems on such aquifers might be an argument for doing so, to the extent that the convention was

designed to protect resources in which the international community as a whole had a significant interest. On the other hand, States parties might be reluctant to incur potentially significant obligations for the benefit of States that had not themselves accepted the duties of the convention.

7. As an alternative, the articles could be recast as a recommendatory set of principles by removing some of the mandatory language. In practice, it might not matter greatly which of the alternatives was chosen, since States with important transboundary aquifers would probably prefer to negotiate specific agreements with their neighbours rather than to rely on a framework convention. Whatever the final form, the articles could make an important contribution by bringing about more systematic and rational management and protection of water resources.

8. With respect to transboundary oil and natural gas resources, his delegation was of the view that the Commission should proceed with caution. States and industries had immense economic and political stakes in the allocation and regulation of oil and gas resources, and any product of the Commission was likely to be highly controversial. Moreover, States had considerable experience in dealing with transboundary oil and gas issues, and there was no urgent humanitarian need to protect those resources. Most of the current provisions of the articles would be inappropriate for oil and gas deposits, which were not subject to pollution, did not support ecosystems, were not relied on for basic human needs and were not expected to be renewed or preserved for future use. The Commission should not rush into a drafting exercise and should not treat the draft articles on the law of transboundary aquifers as a template for all transboundary resources.

9. On the topic of the obligation to extradite or prosecute, his delegation believed that historically the source of the obligation derived from treaties. However, in the modern age there was a strong and consistent tendency to include the obligation in a very large body of treaties at the bilateral and multilateral levels. Special attention should be paid to the source of the obligation for crimes constituting the most serious breaches of international law, namely, genocide, crimes against humanity and war crimes. Crimes of international terrorism might be added to that list in the foreseeable future.

10. In that regard, it was worth considering the Rome Statute of the International Court of Justice, although his delegation did not intend to revive discussion about the "triple alternative". Because of the serious nature of the crimes under the jurisdiction of the Court, the mechanism for surrendering persons charged with those crimes was *sui generis*; the traditional grounds for refusal of extradition, such as non-extradition of nationals and non-extradition for political offences, were not applicable in the case of a person charged with genocide, crimes against humanity or war crimes. His delegation viewed the special treatment of those crimes as evidence supporting the notion that the obligation to extradite or prosecute for that category of serious crimes belonged to the realm of customary law. Although the obligation to extradite or prosecute and the concept of universal jurisdiction were closely interrelated, the two concepts should be dealt with separately, as they derived from different areas of international law.

11. The Republic of Korea was a party to 24 multilateral treaties containing the obligation to extradite or prosecute, as well as 21 bilateral extradition treaties with similar clauses. In the country's domestic law there was no explicit provision concerning the obligation to extradite or prosecute, but article 3 bis of the Extradition Act provided that if an extradition treaty to which the country was a party had a provision different from that in the Act, the treaty provision should be implemented. Therefore, *aut dedere aut judicare* provisions in extradition treaties to which the country was a party had the force of domestic law.

12. **Mr. Kollár** (Slovakia) said, on the topic of reservations to treaties, that in his eleventh (A/CN.4/574) and twelfth (A/CN.4/584) reports the Special Rapporteur had correctly identified the key issues and main difficulties of the subject. His delegation could basically agree with the approach being taken on the formulation and withdrawal of objections and the procedure for acceptances of reservations. Guidelines for the practice of States and international organizations in respect of reservations was a topic of current interest and would be one of the most important results of the Commission's work.

13. A State or international organization had the right to formulate an objection "for any reason whatsoever", to use the language in draft guideline 2.6.3. Limiting the freedom to make objections exclusively to

reservations that were incompatible with the object and purpose of the treaty would unduly reduce its scope. Moreover, the author of an objection had the right to oppose the entry into force of the treaty as between itself and the reserving State but must clearly express its intention to do so. It was his country's practice to specify in its objections the legal consequences it intended. Further, it would be helpful for both the reserving State and for third parties if the objecting State made the reason for its objection known. The time period for formulating an objection was important; draft guideline 2.6.13 followed the 1986 Vienna Convention in setting a period of 12 months from the date on which the State or international organization had been notified of the reservation or had expressed its consent to be bound by the treaty. It was necessary to draw a clear distinction between that date and the date on which the reservation had been communicated to the depositary.

14. Pre-emptive objections, whereby States declared in advance that they would oppose certain types of reservation before they had even been formulated, appeared to fulfil one of the functions of objections, namely, to give notice to the author of the reservation. On the other hand, a pre-emptive objection could produce legal effects only when the reservation to which it referred had been made. His delegation considered that late objections, those formulated after the 12-month period, were invalid and did not produce legal effects.

15. The attempt to define the object and purpose of the treaty in draft guideline 3.1.5, on incompatibility of a reservation with the object and purpose of the treaty, indicated more a direction than a clear criterion; nonetheless, it was very useful. His delegation could agree with the meanings given in the commentary to the terms "essential element" and "raison d'être" of the treaty. It was by no means easy to put together all the elements to be taken into account in determining the object and purpose of the treaty, but the clarifications to be found in draft guidelines 3.1.5 and 3.1.6 and commentaries were helpful.

16. The next cluster of draft guidelines gave examples of the types of reservations which could be interpreted as incompatible with the object and purpose of the treaty. His delegation welcomed the commentary, which made the issues much more comprehensible. With regard to vague or general reservations worded in such a way as to preclude any determination of their scope, his country had formulated several objections on such grounds, including an objection to the "sharia reservation", which did not clearly indicate to the other States parties the extent to which the reserving State had accepted the treaty obligations. The wording of the draft guideline on reservations contrary to a rule of *jus cogens* rightly covered situations in which, although the provisions to which a reservation referred might not reflect a rule of *jus cogens*, the reservation would cause the treaty to be applied in a manner conflicting with *jus cogens*. His delegation appreciated the detailed commentary on reservations to a provision reflecting a customary norm, reservations relating to internal law and reservations to general human rights treaties. Slovakia had only recently begun formulating objections to reservations, and it found the draft guidelines very helpful.

17. **Mr. Henczel** (Poland), speaking on the topic of reservations to treaties, said that the usefulness of the Guide to Practice would depend on the Commission's ability to limit the number and complexity of guidelines. Furthermore, the wording of the guidelines must follow as closely as possible the terminology used in the Vienna Convention on the Law of Treaties.

18. As for the topic of shared natural resources, the Special Rapporteur had been right to recommend that the Commission should proceed with and complete the second reading of the draft articles on the law of transboundary aquifers independently of its work on other shared natural resources such as oil and natural gas fields. Despite the differences between the various categories of those resources, in future it would be difficult to avoid cross-influences between the provisions governing the divers categories. While it would therefore be unwise for the Commission to wait until it had finished drawing up rules on transboundary aquifers before it turned its attention to oil and natural gas, it was uncertain whether the formulation of regulations on the latter could be pursued without regard to the outcome of deliberations on transboundary groundwaters. For example, the titles of most of the draft articles on the law of transboundary aquifers were equally suited to future rules on oil and natural gas.

19. There were, however, some exceptions deriving mainly from divergences in the physical characteristics of the two groups of natural resources. Draft article 10, dealing with recharge and discharge zones, was not

applicable to oil and natural gas. Similarly, the prevention, reduction and control of pollution raised totally different issues in the case of oil and natural gas, inasmuch as groundwaters should be protected against pollution, whereas oil and natural gas could themselves be a dangerous source of contamination. On the other hand, the argument that the two categories of resources should be subject to different regulations because groundwater was a life-supporting resource, while oil and natural gas were merely energy sources, was an oversimplification which failed to take account of the importance of those energy resources for the improvement of human living conditions.

20. The possible links between the two codification exercises should not be rejected a priori: both elements of the general topic deserved further consideration by the Commission. Pressing ahead with its work on the law of transboundary groundwaters might even prove to be beneficial when the time came to draw up rules for oil and natural gas, in that some of the previously elaborated principles might apply. In fact, some rules would obviously be duplicated. Such duplication should, however, be viewed in a positive light as an element confirming the importance of the regulations in question. A final decision on the form the draft articles should take should not be made in a hurry. The Commission should be flexible in that respect. His delegation fully supported the conclusions reached by the Working Group set up in May 2007, especially those concerning the preparation of a questionnaire on State practice with regard to transboundary oil and gas deposits.

21. Turning to the topic of the obligation to extradite or prosecute, he said with reference to the most controversial aspect of the subject, namely the source of the obligation, that the possibility of recognizing customary rules as the basis of the obligation should not be rejected a priori. That question called for deep and careful analysis and the examination of various aspects of State practice. Moreover, it was possible that some links might exist between universal jurisdiction and the *aut dedere aut judicare* principle. Lastly, his delegation approved of draft article 1, as proposed by the Special Rapporteur, and also supported his general ideas concerning further draft articles.

The meeting rose at 10.50 a.m.